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IN THE SUPREME COURT

OF

THE UNITED STATES OF AMERICA

October Term 1977

No. 77-6868

DONALD GENE RUNYAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Appeal from the Supreme Court of California

JURISDICTIONAL STATEMENT

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OPINION BELOW

A. Appellant appeals from an adverse judgment rendered by the Supreme Court of California, ___Cal.3d___, ___Cal.Rptr.___, ___P.2d___ (1978). Said judgment reversed the California Court of Appeal, People v. Municipal Court (Runyan, RPI), 134 Cal.Rptr. 106 (1976). Said opinions are set forth herein as Appendix "A" and Appendix "B".

JURISDICTION

B. The following grounds invoke the jurisdiction of this Court:

(1) This is a criminal proceeding stemming from a complaint filed in Municipal Court, Pasadena Judicial District, charging Appellant with violations of California Vehicle Code Section 23102, subdivision (a), Penal Code Section 148, and Penal Code Section 594, subdivision (a).

(2) Herein, Appellant seeks review of the decision rendered by the Supreme Court of California entitled People of the State of California v. The Municipal Court of the Pasadena Judicial District of Los Angeles County, Donald Gene Runyan, Real Party in Interest, filed January 20, 1978. On February 14, 1978, the Supreme Court of California, per Chief Justice Bird, C.J., extended for thirty (30) days, the time within which to act upon Petition for Rehearing. On March 9, 1978, Petition for Rehearing was denied by the California Supreme Court and remittitur was issued, rendering said opinion final. On June 7, 1978, Notice of Appeal was filed in the Supreme Court of California.

(3) Jurisdiction is conferred upon this Court by Title 28 U.S.C. §1257(2).

(4) Cohen v. California, 91 S.Ct. 1780, 403 U.S. 15, 29 L.Ed.2d 284 (1971); Huffman v. Pursue, Ltd., Ohio 95 S.Ct. 1200, 420 U.S. 592, 43 L.Ed.2d 482 (1975).

Statutory Provisions Involved:

(5) California Penal Code §§1335, et seq. (1341)

"§1335. [Cases in which conditional examination may be had.] When a defendant has been charged with a public offense triable in any court, he in all cases, and the people in cases other than those for which the punishment may be death, may, if the defendant has been fully informed of his right to counsel as provided by law, have witnesses examined conditionally in his or their behalf, as prescribed in this chapter. [1872; 1880 ch 47 §98; 1905 ch 540 §1; 1951 ch 96 §1; 1967 ch 295 §1.]"

"§1336. [Grounds for application] When a material witness for the defendant, or for the people, is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehension that he will be unable to attend the trial, the defendant or the people may apply for an order that the witness be examined conditionally. [1872; 1905 ch 540 §2.]"

"§1337. [Application: How made; Contents of affidavit.] The application must be made upon affidavit stating:

1. The nature of the offense charged.

2. The state of the proceedings in the action;

3. The name and residence of the witness and that his testimony is material to the defense or the prosecution of the action;

4. That the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehension that he will not be able to attend the trial. [1872; 1905 ch 540 §3.]"

"§1338. [Same; To whom made; Notice.] The application may be made to the court or a judge thereof, and must be made upon three days' notice to the opposite party. [1872; 1880 ch 25 §1; 1905 ch 540 §4.]"

"§1339. [Order; When to be made; Contents.] If the court or judge is satisfied that the examination of the witness is necessary, an order must be made that the witness be examined conditionally, at a specified time and place, and before a magistrate designated therein. [1872; 1905 ch 540 §5.]"

"§1340. [Right of defendant to be present; Duties of officer relating thereto.] The defendant has the right to be present in person

and with counsel at such examination, and if the defendant is in custody, the officer in whose custody he is, must be informed of the time and place of such examination, and must take the defendant thereto, and keep him in the presence and hearing of the witness during the examination. [1872; 1905 ch 540 §6.]

"§1341. [Examination not to proceed, when.] If, at the time and place so designated, it is shown to the satisfaction of the magistrate that the witness is not about to leave the state, or is not sick or infirm, or that the application was made to avoid the examination of the witness on the trial, the examination cannot take place. [1872; 1905 ch 540 §7.]

QUESTIONS PRESENTED

C. (1) Whether a state criminal statute may be applied to deprive a defendant of a discovery device found by the trier of fact to be essential to granting effective counsel.

(2) Whether a state criminal statute may be applied to deprive the trial court of its inherent power to control a fair trial.

(3) Whether a state criminal statute may be applied to deny or deprive the trial court the power to order discovery found to be essential and required by due process.

(4) Whether due process is denied to a state criminal defendant when a state criminal statute is applied to deprive the trial judge the power to order discovery found to be essential to ensuring a fair trial and required by due process.

STATEMENT OF THE CASE

D. On March 3, 1975, a complaint was filed in Municipal Court, Pasadena Judicial District, charging Appellant, Donald Gene Runyan, with drunk driving (Vehicle Code §23102, subd. (a)), obstructing a public officer (Penal Code §148), and vandalism (Penal Code §594, subd. (a)). Appellant was arraigned and examined by the trial judge and found to be indigent. Defense counsel is serving pro bono publico.

On April 1, 1975, defense counsel moved for pre-trial discovery, asserting that defendant Runyan did not have sufficient information concerning the charges against him to prepare his defense. Defense counsel filed, in support of the motion, a declaration in which it was asserted that defendant had been driving his van in Pasadena on March 2, 1975, when he had an automobile accident; that as a result of the accident, he had fallen from his vehicle and had hit his head on the pavement, rendering him unconscious. He was revived at the scene by paramedics, and was attempting to start his vehicle when the Pasadena police arrived.

Appellant was ordered from his car and, when he protested, was forcibly removed, causing him again to strike his head on the pavement. He was handcuffed and placed in a police vehicle without being informed of the reason for his arrest. When Appellant kicked at the police car, causing unspecified damage, several officers dragged him from the police vehicle and threw him against its side, producing further injuries. Appellant was taken to the police station and a breathalyzer test was given. The results of the test indicated a blood alcohol content of 0.23%.

The declaration alleged further that defense counsel believed the breathalyzer test results were deliberately falsified by the officers.

At the hearing on the discovery motion, Appellant testified that as a result of the head injury sustained during the accident he was confused and could not remember subsequent events. The Municipal Court granted Appellant's motion to depose the officers based on the fact that Appellant: (1) had "suffered apparently substantial head injury. . . impairing his consciousness, and does not know what happened," and (2) was "not able to assist [his] lawyer here. . . because of [his] inability to know what happened and to communicate what happened to [his] lawyer. . . ." (See Appendix "A", dissenting opinion per Bird, C.J., p. 6.)

The prosecution sought review of the Municipal Court's order by filing a Petition for Writ of Mandate in the Superior Court. The Superior Court denied the petition, finding that: (1) Runyan "does not have sufficient memory of the facts leading to the criminal complaint against him so that he may properly cooperate and assist his Counsel in the preparation of an intelligent defense"; (2) the "Pasadena Police Officers who were present at the incident giving rise to the criminal complaint against [Runyan] do have the information and this information can only be elicited prior to trial through the use of depositions"; and (3) the "information must be obtained prior to trial if Counsel for the defense is to properly prepare an intelligent defense to the charges." (Emphasis added.) (See Appendix "A", dissenting opinion per Bird, C.J., p. 7.)

The People filed a Notice of Appeal and carried their Appeal of the denial of the Writ by the Superior Court to the Court of Appeal. The Court of Appeal affirmed the denial of the Writ in a published opinion written by Justice Bernard Jefferson and concurred in by Acting Presiding Justice Kingsley and Justice Dunn; sub.nom. People v. Runyan, 134 Cal.Rptr. 106 (1976). The Supreme Court of California granted the People's Petition for Hearing on January 13, 1977.

Both Appellant and the People filed briefs and were heard at oral argument. On January 20, 1978, in a 5:2 opinion, the Supreme Court of California reversed the ruling of the Court of Appeal and remanded the case to the Superior Court with directions to issue the peremptory writ.

Said opinion denying Appellant's discovery motion was rendered notwithstanding Appellant's contentions that such discovery was essential to ensuring effective counsel and was granted pursuant to a valid exercise of the trial court's inherent power to conduct a fair trial and ensure due process of law. Said contentions were raised by Appellant by motion supported by declaration in the trial court, by oral argument in Superior Court Appellate Department, by brief in the Court of Appeal, and by brief and oral argument in the Supreme Court of the State of California. In his Real Party in Interest brief to the Supreme Court of California, Appellant urged specifically that: "Without the ordered discovery, the defendant Runyan cannot receive a fair trial as his defense will not be the intelligent defense required by fundamental fairness." (p. 15, ll. 19-22.) Further, Appellant urged that:

> "The Courts as the Guardians of due process, Boyd v. United States (1886) 116 U.S. 616, 291 L.Ed. 746 have the inherent discretion to ensure a fair trial by ordering criminal discovery for a defendant." p. 15, ll. 23-26.

Appellant respectfully submits that the ruling of the Supreme Court of California has denied him the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution, and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. Appellant submits that said ruling presents the kinds of issues contemplated in Title 28 U.S.C. §1257(a) and therefore confers jurisdiction upon this Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

E. Appellant, having been knocked unconscious, has been and is now unable to recall any of the events surrounding his arrest. Appellant has maintained and continues to maintain that the only way he may learn of those events is by deposing the only witnesses, the arresting officers. As was found by the trier of fact, without said depositions, Appellant will be incapable of preparing an adequate defense to the charges against him.

The Supreme Court of California held improper a lower court ruling that Appellant be given the opportunity to depose the arresting officers, on the theory that California Penal Code §§1335, et seq., evidence the intent of the California Legislature that depositions are proper in criminal cases only to preserve testimony and may not be used as a discovery device. That court so held despite the fact that the trial judge had ruled that Appellant's particular situation made it impossible for Appellant's counsel to anticipate

or prepare to challenge any testimony aside from those basic facts contained in the police report, without said depositions.

It is Appellant's contention that the Sixth Amendment guaranty of right to effective counsel is a fundamental right that applies to the states through the Fourteenth Amendment (Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)), and therefore ought to be vigorously safeguarded against state action, for if the "constitutional safeguards it provides be lost, justice will not 'still be done'." Johnson v. Zerbst, 304 U.S. 458, 462 (1938). Appellant submits that the aforementioned California Supreme Court holding, if let stand, will deny him all the safeguards contemplated by and embodied in the promise of right to effective counsel, for that holding renders him wholly unable to obtain information vital to his defense, and precludes even the possibility that justice will be done.

In Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), this Court discussed the Sixth Amendment guaranty of right to effective counsel in terms of the "giving of effective aid." There it was held that defendant's attorney was appointed so late in the proceedings that he was unable fully to discuss and explore the facts of the case with his client and therefore could not properly prepare for trial. This defect resulted in a denial of Powell's right to effective counsel. Appellant contends that the California Supreme Court's holding will operate in a substantially similar way to deny him effective assistance of counsel, for his attorney will not know the material facts of the case until the moment of trial when the arresting officers testify on direct examination. Such a situation runs afoul of the Powell rationale and is repugnant to both the spirit and the letter of the Sixth Amendment.

The thrust of California Penal Code §§1335, et seq., when applied to the facts of the instant appeal, is that Appellant, Donald Gene Runyan, must stand trial without effective assistance of counsel. His attorney must attempt to challenge the arresting officer's direct testimony not by exploring weaknesses and inaccuracies revealed by reflection and careful investigation, research and preparation, but must attempt to ferret truth from places whose existence will become known to him only moments beforehand. And not only will Appellant be forced to resort to this kind of ad hoc cross-examination, but he will be bereft of any meaningful opportunity to present a credible defense.

The trial court specifically found that Appellant could not prepare an adequate defense without the ability to depose the arresting officers. California Penal Code Sections 1135, et seq., were held to preclude said depositions. Appellant therefore submits that those statutes are unconstitutional as applied because their application denies him the fundamental right of effective assistance of counsel, a right so fundamental that its denial by a state gives rise to a substantial federal question requiring pleanry consideration with briefs on the merits and oral argument for resolution.

A substantial federal question is presented when a state criminal statute is held to deprive the trial court of its inherent power to control a fair trial. Upon a specific finding that the information sought to be discovered was necessary and must be obtained prior to trial, the trial court ordered the discovery sought, despite objection by the People that the statutory conditions for invoking deposition procedure had not been met. Appellant has urged that the courts possess an inherent power to issue discovery orders in criminal cases when the interests of justice so demand, and that a defendant's motion to discover

is addressed solely to the sound discretion of the trial court. Specific findings of necessity for the requested discovery were made by both the Municipal and Superior Court judges, none of which were disputed by the State. It is submitted that if a state statute may prevent a trial court from providing that which it finds necessary to ensuring due process of law to a criminal defendant, then the entire judicial function exists at the whim of the legislature, and a challenge to that statute involves substantial questions of constitutional law, both as to Appellant and to any subsequent criminal defendant seeking the exercise of the Court's inherent power.

It has been universally recognized that the courts are the guardians of due process, Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746 (1886), and that even in the absence of Constitutional mandate or enabling legislation, the Courts possess the inherent power to provide for the orderly administration of justice through judicially declared rules of criminal discovery. It is also well settled that the legislature cannot pass a law in derogation of the United States Constitution. Therefore, where the trial court, after hearing all pertinent evidence in an adversarial proceeding, has made a finding that certain discovery by the defendant is essential to ensuring a fair trial, to the extent that any part of Penal Code §§1335, et seq. are held to deprive the defendant of that discovery, said code sections are unconstitutional as violative of due process of law and the right to a fair trial. Such issues, both as to Appellant and the People of the State of California, require plenary consideration and

necessitate briefs on the merits and oral argument for resolution.

DATED: June 6, 1978.

Respectfully submitted,

SOUTHWESTERN CLINICAL LAW CENTER

By R. W. Williamson
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APPENDIX "A"

Opinion of the Supreme Court of

California

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Appellant, v. THE MUNICIPAL COURT FOR THE PASADENA JUDICIAL DISTRICT OF LOS ANGELES COUNTY, Defendant and Respondent; DONALD GENE RUNYAN, Real Party in Interest and Respondent.	L.A. 30722 (Super. Ct. No. C 123383)

In this case we inquire whether courts may permit a defendant in a criminal case to depose prosecution witnesses prior to trial, despite the defendant's failure to establish, as required by statute (Pen. Code, § 1335 et seq.), that the witnesses are about to leave the state or are unlikely to attend the trial. We conclude that although courts possess broad inherent

-- SEE DISSENTING OPINION --

powers to provide for discovery in criminal cases, they should decline to exercise those powers in a manner which would ignore present statutory limitations or which would create a different, more extensive deposition procedure than that presently prescribed by statute.

In 1975 a complaint was filed in municipal court charging real party, Donald Gene Runyan, with drunk driving (Veh. Code, § 23102, subd. (a)), obstructing a public officer (Pen. Code, § 148), and vandalism (Pen. Code, § 594, subd. (a)). Shortly after the complaint was filed, real party's counsel filed a pretrial discovery motion seeking, among other things, to depose the police officers involved in the various charges. (Real party evidently intends to assert police brutality and falsification of evidence as defenses to these charges.)

Real party's motion was granted by the municipal court, despite objection by the People to the effect that the statutory conditions for invoking deposition procedure had not been met. The People thereupon unsuccessfully sought a writ of prohibition in superior court. The People have appealed denial of the writ. (See Code Civ. Proc., § 904.1, subd. (a),

Burrus v. Municipal Court (1973) 36 Cal.App.3d 233, 235, 238.)

There is statutory authorization for the "conditional examination" of witnesses in criminal cases. Penal Code section 1336 provides that "When a material witness for the defendant, or for the people, is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehension that he will be unable to attend the trial, the defendant or the people may apply for an order that the witness be examined conditionally." Sections 1337 through 1345 describe the procedures for deposing such witnesses. Significantly, no provision is made for deposing witnesses who are not encompassed within the category of persons described in section 1336. On the contrary, section 1341 expressly provides that, "If, . . . the witness is not about to leave the state, or is not sick or infirm, . . . the examination cannot take place." It is not disputed that real party's application herein did not contain the requisite statutory allegations.

There are two aspects to real party's primary argument. The courts possess an inherent power to issue discovery orders in criminal cases. They may

exercise that power to order the taking of depositions of material witnesses even though defendant has failed to comply with those mandates of the Penal Code described above. We agree with real party's first premise, but reject the second, concluding that these powers may not be exercised in a manner which conflicts with express statutory provisions.

In Pitchess v. Superior Court (1974) 11 Cal.3d 531, 535, we recently expressed a controlling principle: "Unlike the statutory development of civil discovery in California, the right of an accused to seek discovery in the course of preparing his defense to a criminal prosecution is a judicially created doctrine evolving in the absence of guiding legislation. [Citations.] A defendant's motion to discover is addressed solely to the sound discretion of the trial court, which has inherent power to order discovery when the interests of justice so demand. [Citations.]" (Italics added.) Pitchess expressly recognized that legislative silence on the subject of discovery "means that it has left to the courts the adaptation of common law concepts." (P. 536, summarizing with approval a similar statement by Chief Justice Traynor in Shively v. Stewart (1966) 65 Cal.2d 475, 479.) We stated the same principle in Hill v. Superior Court (1974) 10 Cal.3d 812, 816, footnote 3: "This court has developed rules of criminal discovery in the absence of legislation. [Citations.]" (Italics added.)

The exercise of a judicial power over criminal discovery which inheres in courts when the Legislature is silent must be tempered and restrained when the Legislature has spoken. In the matter before us the Legislature, pursuant to a constitutional grant, has expressed itself on the subject of deposition in criminal cases and has plainly declined to extend deposition procedures beyond those present confines carefully described in Penal Code section 1336. Accordingly, as will appear, we conclude that it would be inappropriate to exercise our inherent powers in conflict with existing legislation. As we have previously insisted, "The courts should only exercise those common law powers which are not otherwise repugnant to or inconsistent with our Constitution and statutes, inherent powers should never be exercised in such a manner as to nullify existing legislation or frustrate legitimate legislative policy." (Ferguson v. Keays (1971) 4 Cal.3d 649, 654, italics added; see Martin v. Superior Court (1917) 176 Cal. 289, 296-297.)

An examination of the constitutional foundations of the criminal discovery rules reveals that before 1974, article I, section 13, of the California Constitution provided in pertinent part that: "The Legislature also shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide where there is reason to believe that the witness, from inability or other cause, will not attend at the trial." (Italics added.) By reason of the foregoing language of section 13, the state Constitution itself "seem[ed] to qualify the right to depositions in criminal cases . . . ." (Clark v. Superior Court (1961) 190 Cal.App.2d 739, 741.)

In Clark, the court held that a defendant in a criminal case has no right to take the depositions of witnesses except in the limited situations permitted by the Constitution and statutes. The court further observed that the only relevant cases from other states had denied the right to take such depositions, and that "It is significant that the Legislature, over the years, has seen fit to provide for the taking of depositions of prosecution witnesses in criminal cases only in

the limited situations set forth in the before-mentioned code sections [Pen. Code, § 1335 et seq.]." (P. 741.) The Clark court also found it "highly significant" that although the Legislature had liberalized civil discovery procedures in 1957, "it made no change in the statutes concerning depositions in criminal cases." (P. 742.)

Clark also emphasized several relevant considerations, noting that the prosecution has no right to depose the defendant or his witnesses, that "[T]he right to take depositions should be a mutual one," and that defendant has reasonable alternative means of discovery, such as interviewing prosecution witnesses. (Pp. 742-743.) It concluded that "If it is deemed advisable to change such a long-established procedure, such change should be made by the Legislature rather than by the courts, if for no other reason than that provision as to the manner of taking such depositions must be made. The defendant would be required necessarily to be present, and certainly a notary public's office or the office of the defendant's attorney (places in which depositions in civil cases may be taken) would hardly be fit places for the taking of the depositions of defendants in criminal

cases, particularly defendants then in a jail or penitentiary. Also protection would have to be provided against using the taking of a deposition as merely an excuse for a junket trip for a confined defendant." (P. 743.) Several Court of Appeal cases subsequent to Clark are in accord with its holding and with its underlying rationale. (See People v. Bowen (1971) 22 Cal.App.3d 267, 277-280; Everett v. Gordon (1968) 266 Cal.App.2d 667, 671; People v. Oakley (1967) 251 Cal.App.2d 520, 524; People v. Mersino (1965) 237 Cal.App.2d 265, 269; Yannacone v. Municipal Court (1963) 222 Cal.App.2d 72, 74-75; see generally Comment, Depositions as a Means of Criminal Discovery, 7 U.S.F.L.Rev. 245.)

It is argued, however, that a recent change in the applicable provision of the state Constitution evidences an expression of the people's will to permit courts to order depositions in criminal cases unrestricted by former constitutional limitations. In 1974, by constitutional amendment, former section 13 of article I (described above) was repealed and section 15 was adopted in the following form: "The Legislature may provide for the deposition of a witness in the presence of the defendant and the

defendant's counsel." The effects of this new provision are to delete the former restriction against depositions in homicide cases and the requirement that the proposed witness must be deemed unable to attend trial.

It is readily apparent, however, that the new section 15 is not self-executing, and that it does not, by itself, afford criminal defendants additional discovery rights. Rather, section 15 merely authorizes the Legislature to make provision for depositions in criminal cases. As we have seen, the sole provisions adopted by the Legislature, thus far, on this subject are contained in the sections concerning the conditional examination of witnesses. (Pen. Code, § 1335 et seq.) Accordingly, we may assume that, at this juncture, the Legislature has, for reasons satisfying to itself, intended to restrict the availability of criminal deposition procedures to those situations specified in the Penal Code.

The dissent argues that neither the constitutional provision nor the legislative enactments were intended to foreclose the use of depositions for purposes of pretrial discovery in criminal cases. As we have noted above, we fully agree that as a general proposition courts possess inherent powers to develop rules of criminal discovery

in the absence of legislation on the subject. Yet, as we also have explained, the Legislature has acted to limit the taking of pretrial depositions to those situations specifically described in Penal Code sections 1335 through 1345. Contrary to the contention of the dissent that these statutory provisions are "silent" on the subject of the use of depositions for pretrial discovery, section 1341 expressly and unmistakably provides that "the examination cannot take place" unless the statutory conditions (unavailability or illness of witness, etc.) are met. Were the courts to devise a procedure to allow the taking of a deposition of a witness despite his probable availability at trial, such procedure would flatly and directly conflict with section 1341.

Real party advances a procedural due process argument, urging that the availability of depositions is essential to any fair trial. He cites no cases holding that his claim has a constitutional foundation however, and indeed the law appears otherwise. As we noted in Jones v. Superior Court (1962) 58 Cal.2d 56, "Pretrial discovery in favor of defendants, . . . is not required by due process. [Citations.] Accordingly, when this court permitted discovery in advance of as well as at the trial [citations], it was not

acting under constitutional compulsion but to promote the orderly ascertainment of the truth." (Pp. 59-60.) The appellate court in People v. Bowen, supra, 22 Cal. App.3d 267, more recently observed that "It generally has been recognized that [a] right to a deposition in criminal cases did not exist at common law, nor is it a constitutional right. In criminal cases, the right to a deposition is governed by the foregoing constitutional and statutory provisions [Cal. Const., art. I, § 15, formerly § 13; Pen. Code, § 1335 et seq.]. [Citations.]" (P. 278, italics added.) Significantly, although legislative authority for deposition procedure is presently contained in section 15, the availability of depositions is not included in the list of fundamental rights specified in that same section.

The dissent herein urges that real party has made a compelling showing of need for pretrial discovery, because he has asserted a lapse of memory regarding the incident in question and needs to know the alleged facts regarding the charges against him. Such a showing of "need," however, could be satisfied by any assertedly innocent accused who denies his presence at the crime scene and, accordingly, requires pretrial depositions to inform him of the underlying facts. The circumstances of the present case not being particularly unusual, a

similar claim of necessity could be made by anyone charged with offenses which allegedly he did not commit.

We note that an accused is not, of course, wholly without means of ascertaining the facts upon which a criminal charge is based. In felony cases, the preliminary examination or grand jury hearing transcripts will ordinarily provide a valuable source of pretrial information. In addition, police reports and witnesses' statements are readily discoverable upon a proper showing of need. (See Pitchess v. Superior Court, supra, 11 Cal. 3d 531, 537-538 [discovery of sheriff's records of prior brutality by deputies].) Furthermore, nothing ordinarily would prevent the accused from interviewing prosecution witnesses to ascertain their version of the events. (See Clark v. Superior Court, supra, 190 Cal.App.2d 739, 742-743; People v. Lopez (1963) 60 Cal.2d 223, 246-247 [discovery of names of prosecution witnesses].)

There are many reasons why the Legislature may be reticent to extend deposition procedures in criminal cases notwithstanding a constitutional authorization: the existence of sufficient alternative means of achieving pretrial discovery; the factor of considerable state expense relating to the payment of witness and transcription fees, for the services of a magistrate (see Pen. Code, § 1339), counsel and security arrangements; substantial trial delays

which might ensue, given the necessity for adequate notice of depositions, opportunity for objections and hearings, and difficulties in scheduling depositions which, under present law (Cal. Const., art. I, § 15; Pen. Code, § 1340) must be taken in defendant's presence if he so desires.

The Legislature has chosen to limit the availability of deposition procedures in criminal cases to those particular situations which it has specified. We do not speculate as to its reasons. It is enough for us to know that it has not chosen to do what constitutionally it may do. We decline to exercise our inherent powers to achieve a different result which would conflict with its legislation. (Ferguson v. Keays, supra, 4 Cal.3d 649, 654.)

Similar policy considerations involving the complexity and difficulty in balancing various competing factors moved us recently in Reynolds v. Superior Court (1974) 12 Cal.3d 834, to decline adoption of a "notice-of-alibi" discovery procedure. We observed that the issues involved "complex and closely balanced questions," the gravity of which counseled against the exercise of our rule-making power. (P. 837.) As we explained in Reynolds,

"It is one thing for a court to prescribe judicial procedure necessary to protect some fundamental constitutional principle or to effectuate some specific constitutional guarantee of individual liberty. [Citations.] It is quite another thing for a court to design judicial procedures which are in no way required by higher law but which may seem to some socially desirable and perhaps may be permitted--at least to some extent--by our state and federal Constitutions." (Pp. 845-846, italics in original.)

We concluded in Reynolds that "This court has not been vested with formal, quasi-legislative, rule-making power, either by the California Constitution or the Legislature," and that "due regard for this court's function as constitutional adjudicator, and solicitude for this state's governmental scheme of shared legislative and judicial responsibility for the sound administration of justice, render it inappropriate for us to create by judicial decision a notice-of-alibi procedure for California courts." (Id., pp. 849-850.) We reaffirm, within the present context, the wisdom of this principle of restraint, concluding that it would be both improper and unwise for the California courts to exercise their inherent power over discovery matters to provide for depositions in situations not presently authorized by statute.

Indeed, a very recent case on this subject demonstrates and underscores the wisdom of the foregoing principle. In Bailey v. Superior Court (1977) 19 Cal.3d 970, 977-978, involving the use of videotaped depositions, we carefully explained that since the applicable legislation limits depositions to proceedings in "written" form, any change in procedure authorizing videotaping should devolve from legislative, not judicial, action.

The judgment is reversed and the cause remanded to the superior court with directions to issue the peremptory writ.

RICHARDSON, J.

WE CONCUR:

MOSK, J.
CLARK, J.
MANUEL, J.
SULLIVAN, J.*

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

C O P Y

PEOPLE v. MUNICIPAL COURT (RUNYAN)

L.A. 30722

DISSENTING OPINION BY BIRD, C.J.

I respectfully dissent.

This court must decide whether a trial court has abused its discretion by ordering discovery by deposition in a criminal case where the accused, having been knocked unconscious, is unable to remember any of the events surrounding his arrest, where nearly all of the evidence is in the exclusive possession of state agents, and where the accused suspects that some of the evidence against him may have been fabricated.

The majority opinion holds that it would be "inappropriate" to grant discovery in this factual setting because to do so would "conflict with existing legislation." (Majority opn., ante, p.____.*) However, an historical analysis of the pertinent section of the California State Constitution and a careful review of statutory law establishes that there is no such conflict. The majority reaches its erroneous conclusion by confusing two separate kinds of depositions: depositions used for discovery purposes and depositions used to preserve testimony for trial.

* Multilith opinion at page 5.

I

As the majority recognizes, "courts possess broad inherent powers to provide for discovery in criminal cases . . . ." (Majority opn., ante, p. ____.*) These powers exist "even in the absence of constitutional mandate or enabling legislation" (Reynolds v. Superior Court (1974) 12 Cal.3d 834, 837), because they are among the "inherent power[s] of every court to develop rules of procedure aimed at facilitating the administration of criminal justice and promoting the orderly ascertainment of the truth." (Joe Z. v. Superior Court (1970) 3 Cal.3d 797, 801-802.)

Since at least 1956 (People v. Riser (1956) 47 Cal.2d 566, cert. den., 353 U.S. 930, overruled on other grounds in People v. Morse (1964) 60 Cal.2d 631), this court has authorized the trial courts to exercise these powers to provide for discovery by an accused in a criminal case because of its belief in "the fundamental proposition that he [the accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information." (Pitchess v. Superior Court (1974) 11 Cal.3d 531, 535.) The trial courts have been vested with "broad discretion" (Evans v. Superior Court (1974) 11 Cal.3d 617, 626) in exercising these powers, so as to

* Multilith opinion at pages 1-2.

facilitate "the true purpose of a criminal trial, the ascertainment of the facts." (Riser, supra, 47 Cal.2d at p. 586.)

Consequently, this court has authorized a wide variety of pretrial discovery on behalf of an accused depending upon the facts of the particular case, including (1) a psychiatric examination of a complaining witness in a sex case (Ballard v. Superior Court (1966) 64 Cal.2d 159); (2) a record of the prior felony convictions of a prosecution witness (Hill v. Superior Court (1974) 10 Cal.3d 812); (3) internal disciplinary records of a police agency where an individual was accused of battery on a police officer (Pitchess v. Superior Court, supra, 11 Cal.3d 531); (4) a pretrial lineup, where the identity of the perpetrator was a "material issue" in the case (Evans v. Superior Court, supra, 11 Cal.3d 617, 625); (5) extensive documentary and testimonial evidence from law enforcement officers where an accused raised a prima facie defense of discriminatory enforcement of the laws (Murgia v. Municipal Court (1975) 15 Cal.3d 286); and (6) a statistical summary of a sheriff's department's records over a 14-year period where an accused raised a prima facie defense of discriminatory enforcement of the laws (Griffin v. Municipal Court, ante, p.____). In order to determine if the trial court here abused its broad discretion by ordering pretrial discovery by deposition of the officers involved in the accused's arrest, the facts of the present case mus be considered in light of these well-established precedents.

On March 3, 1975, the City Prosecutor of Pasadena filed a complaint that charged real party in interest, Donald Gene Runyan, with the commission of three misdemeanors on March 2, 1975: Vehicle Code section 23102, subdivision (a) (driving under the influence of alcohol), Penal Code section 148 (resisting, delaying or obstructing a peace officer in the performance of his duty), and Penal Code section 594, subdivision (a) (vandalism).

Defense counsel moved for pretrial discovery, seeking, in part, to depose the officers who arrested Runyan and who administered a breathalyzer test to him.[1/] Runyan's counsel asserted that his client did not have sufficient information concerning the charges to prepare his defense. Consequently, depositions were "necessary so that the Defendant may learn the specific nature and facts of the charges made against him."

In support of the discovery request, defense counsel filed an affidavit alleging upon information and belief the following: as a result of a traffic collision on March 2, 1975, Runyan was thrown from his automobile and knocked unconscious. He remained unconscious until revived by paramedics who responded to the accident. As

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1/ Runyan also moved to discover other items (e.g., police reports, lab reports, prior complaints against the arresting officers). Discovery was granted as to these items, and the state does not now contest the validity of those orders.

he was attempting to start his automobile, the Pasadena police arrived. Runyan was ordered from his car and, when he protested, was forcibly removed, causing him again to strike his head on the pavement. He was handcuffed and placed in a police vehicle without being informed of the reason for his arrest. When Runyan kicked at the police car, causing unspecified damage, several officers dragged him from the police vehicle and threw him against its side, producing further injuries. One officer became verbally abusive. When Runyan complained that the handcuffs placed on his wrists were too tight, an officer tightened them further. Runyan was taken to the police station and a breathalyzer test was given. The results of the test indicated a blood alcohol content of 0.23 percent.

The affidavit alleged further that defense counsel believed the breathalyzer test results were deliberately falsified by the officers in order to justify the arrest. He alleged (1) that "[t]here were no recorded objectives [sic] of intoxication, but merely opinion expressed in several areas of the [14-page police] report that Mr. Runyan must be intoxicated" and (2) that witnesses indicated that Runyan had consumed an amount of alcohol prior to the accident that was inconsistent with a blood alcohol level of 0.23 percent.

At the hearing on the motion, Runyan testified that as a result of the head injury during the accident

he was confused or could not remember subsequent events. The municipal court granted his motion to depose the officers based on the fact Runyan (1) had "suffered apparently substantial head injury . . . impairing his consciousness, and does not know what happened" and (2) was "not able to assist [his] lawyer here . . . because of [his] inability to know what happened and to communicate what happened to [his] lawyer . . . ."[2/]

The prosecution sought review of the municipal court's order by filing a petition for writ of mandate in the superior court. The superior court denied the petition, finding that (1) Runyan "does not have sufficient memory of

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2/ The municipal court also gave the following reasons in support of its ruling:

"I now think we have before us the reasons for the request, the reasons for the opposition and the reasons for the ruling, and as I say, I am most interested in where the case goes from here. Probably this case, because of particular injuries, may be an appropriate case for this order. I hope so. That is why I made it. If I didn't think so, I wouldn't make it, but I would be most interested in the attitude of any Appellate Court, particularly any members thereof who have been called upon to defend a case in a trial, knowing as all trial judges do, that while it is true that the defendant has been provided with arrest record report information, that the police officers are not limited to what they say in their reports and are entitled to recall and refresh their memory as to any facts, events or circumstances which they can recall happened, and Mr. Runyan's particular situation would make it impossible for him to anticipate that or to inform his counsel concerning its possibility or to refute it at the trial, and that is why I am allowing you this case because the information supplied which has been supplied in the best of faith is no way binding on the People. It does not limit them in any way. For that reason, I think that is an appropriate case." (Emphasis added.)

the facts leading to the criminal complaints against him so that he may properly cooperate and assist his Counsel in the preparation of an intelligent defense"; (2) the "Pasadena Police Officers who were present at the incident giving rise to the criminal complaints against [Runyan] do have the information and this information can only be elicited prior to trial through the use of depositions" and (3) the "information must be obtained prior to trial if Counsel for the defense is to properly prepare an intelligent defense to the charges." This appeal by the state followed.

In view of the specific findings by both the municipal and superior court judges, none of which are disputed by the state, it is impossible to conclude that the order for pretrial discovery by deposition was an abuse of the court's broad discretion in this area. Virtually all of the evidence on two of the charges (Pen. Code, §§ 148, 594, subd. (2)) and most of the evidence on the remaining charge (Veh. Code, § 23102, subd. (a)) are in the exclusive possession of agents of the state and are inaccessible to the defense except through the use of depositions.[3/] Some of the

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3/ The delivery of the 14-page police report to defense counsel is inadequate to overcome the deficiencies. Not only is the prosecution generally entitled to elicit testimony from police officers beyond what is explicitly written in their reports (see fn. 2, ante; but see People v. Campbell (1972) 27 Cal.App.3d 849), but the report here apparently does not contain statements by all four of the officers involved, does not address the falsification of evidence questions, and does not indicate to Runyan the type of section 148 violation he allegedly committed.

evidence to be used at trial is alleged to have been fabricated. This showing fully supported, if it did not compel,[4/] the trial court's order.

II

Nevertheless, the majority concludes the trial court's order is inconsistent with article I, section 15 (formerly art. I, § 13) of the California Constitution, which, it is claimed, "'seem[s] to qualify the right to depositions in criminal cases . . . .'" (majority opn., ante, p.____ *, quoting from Clark v. Superior Court (1961)

4/ It is true that prior decisions by this court have held that California's general rules of discovery in criminal cases were not constitutionally compelled. (Jones v. Superior Court (1962) 58 Cal.2d 56, 59; but see Reynolds, supra, 12 Cal.3d at 846 (citing the landmark criminal discovery case, People v. Riser, supra, in support of the proposition that a court has inherent power "to prescribe judicial procedures necessary to protect some fundamental constitutional principle or to effectuate some specific constitutional guarantee of individual liberty." [Emphasis in original.]).)

However, the court in Jones also recognized that even absent established rules of discovery, there would arise occasions when a criminal accused would be "permitted discovery . . . when necessary to insure due process of law." (Jones, supra, 58 Cal.2d at p. 59.) (Accord Reynolds, supra, 12 Cal.3d at pp. 837-838; see also Hill v. Superior Court (1974) 10 Cal.3d 812, 820 (". . . the denial of [discovery of the prior felony convictions of the prosecution's witnesses] in some instances would not deprive an accused of a fair trial."); Evans v. Superior Court (1974) 11 Cal.3d 617, 625 (". . . due process requires in an appropriate case that an accused . . . be afforded a pretrial lineup . . .").)

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* Multilith opinion at page 6.

190 Cal.App.2d 739, 741. That conclusion is incorrect. Article I, section 15, was intended solely to authorize a limited exception to the right of an accused to confront witnesses at trial by providing a means of perpetuating the testimony of a prosecution witness who might otherwise be unavailable to testify at trial. Both the history and the wording of this section establish that it was not intended either to impact on the use of depositions as a means of pretrial discovery or to limit the right of an accused to a deposition.

A. As Enacted in 1879, Article I, Section 13, of the Constitution Was Intended Solely to Permit an Exception to the Right of an Accused to Confront Witnesses at Trial And Was Not Intended to Forbid the Use of Depositions in Other Contexts.

When California's present Constitution was enacted in 1879, it contained a provision in article I, section 13, authorizing the Legislature to provide for depositions in criminal cases in certain situations:

> The legislature shall have the power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial.5/

5/ In its entirety, article I, section 13, read as follows when enacted:

"In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend,

The purpose of this provision was to authorize the Legislature to carve out an exception to the general rule that in a criminal case the accused had a right to be confronted by the witnesses against him at trial. The provision was not intended to interfere with the use of depositions in any other context. Consider the debates of the Constitutional Convention of 1878-1879 on this section. According to one of the delegates to the convention, Judge Jones, "the object of [the provision] was to relieve witnesses from the very manifest hardship in cases where they are unable to furnish bail, [6/] and who reside at some other place than where the charge is made." (Debates and Proceedings, Cal. Const. Convention 1878-1879, p. 1188.) According to another delegate, Judge Hager, "it is very important to take depositions . . . . The complaint

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(Fn. 5 continued)

in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law. The legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial."

6/ According to another delegate, "when a crime is committed against a stranger, as has been the practice in the past, he must either give bonds for his appearance as a witness against the accused, or else go to jail and stay there until the time of the trial." (Debates and Proceedings, Cal. Const. Convention 1878-1879, p. 1189.)

is not so much that innocent men are convicted, as that the guilty escape punishment. Now, on the other side, when complaint is made against any person charged with crime, there is often delay, sometimes for weeks and months, and when the period of trial comes, the witnesses cannot be found. They are gone. They cannot be got. Sometimes they are spirited away, and the result is that they defeat the ends of justice. . . . I will state again that it is very necessary and essential in the administration of justice in large cities, that this privilege of taking depositions should be obtained; otherwise there will be a failure in the administration of justice in many cases, because the witnesses cannot be had." (Ibid., emphasis added.)

As originally proposed, the constitutional provision dealing with depositions did not contain the exception for homicide cases and did not provide that the deposition be taken "in the presence of the party accused and his counsel." In this form, the provision aroused considerable opposition, because, as Judge Jones stated, despite its "meritorious object, . . . we have to abandon one of the rights which has been heretofore so highly prized, the right to be confronted with their witnesses, and meeting their accusers face to face." (Ibid.) To meet this objection, Judge Hager proposed to add the restrictions currently in the statute. (Ibid.) "Now, I

will ask my friend over there [Judge Jones] what can be the objection to taking the deposition of a witness in the presence of the party accused. . . . How can he suffer any wrong. He is confronted with the witness. He can cross-examine the witness; he can impeach him, the same as if the testimony was taken in Court." (Ibid., emphasis added.) As thus amended,[7] the provision passed.

It is clear that the purpose of the constitutional provision relating to depositions was intended solely to provide a means of perpetuating the testimony of a witness who might otherwise be unavailable to testify for the prosecution at trial. It created an exception to a "fundamental" right of an accused. (People v. Ward (1895) 105 Cal. 652, 656.) Nothing in the debates hints that the Constitution was intended to touch upon the use of depositions as a means of discovery or to limit in any way the right of an accused to a deposition.[8]

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[7] A technical amendment, irrelevant to the present discussion, was also made in the wording of the final portion of the sentence. (Id., at p. 1189.)

[8] "Inasmuch . . . as the tenor of [article I, section 13, as a whole] clearly shows, with the exception noted, that it was intended for the protection of defendants, there is no prohibition upon the power of the legislature to authorize the taking of depositions by the defendant in every class of criminal case." (Emphasis in original.) (People v. Hurtado (1883) 63 Cal. 288, 294, affd. (1884) 110 U.S. 516.) By contrast, the court noted, "depositions cannot now be used against the defendant in cases of homicide." (Ibid., emphasis in original.)

B. The Word "Deposition," as Used in the California Constitution, Covers only Depositions Taken Out-of-Court as Conditional Testimony, and Does Not Cover Depositions Taken Solely for Discovery Purposes.

An inquiry into the meaning of the word "deposition" as used in article I, section 13, makes even clearer that this constitutional provision was never intended to affect a court's power to provide for discovery by deposition.

In 1879, when the section was adopted, the Legislature had provided for the use of "depositions" in at least nine separate places in the Penal Code:

(1) Sections 1335-1345 provided for "depositions" in the form of a "conditional examination" to be taken by an accused of one of his material witnesses if the witness "is about to leave the state or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial."9/

Once taken, the "deposition" was admissible at trial by either party, "upon its appearing that the witness is unable to attend . . . ."

(2) Section 1346 extended the "conditional examination" type of deposition, provided for in sections 1335-1345, to prisoner witnesses.10/

9/ As enacted in 1872, only a defendant could take advantage of these sections, not the prosecution. Moreover, there was no provision for either the defendant or his counsel to be present at the taking of this "deposition." Not until 1905 were these statutory rights extended to the prosecution and the presence of the accused compelled. (Stats. 1905, ch. 540, §§ 1-7, pp. 702-703.)

10/ This section was never applicable to the prosecution. It was repealed in 1941 (Stats. 1941, ch. 106, § 16, p. 1132), but was replaced later that same year by section 2622 (Stats. 1941, ch. 802, § 4, p. 2349). If a judge does not order a prisoner witness produced for a criminal action pursuant to sections 2620 and 2621, section 2622 now provides that the "deposition" of the prisoner may be taken as authorized by sections 1335-1345.

(3) Section 686, subdivision 3 authorized the use of a witness' preliminary hearing "deposition" at trial where (1) the defendant had been present at the hearing and had "either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness" and (2) the witness was dead, insane, or unavailable after the exercise of due diligence.

The section also authorized the use at trial of a section 1335 "deposition."11/

(4) Section 882 provided for a "conditional examination" to be taken "on behalf of the people" of any of their material witnesses who were examined at the preliminary hearing and who were unable to post bond for their appearance in superior court. This "conditional examination" was required to be held "in the presence of the defendant, or after notice to him, if on bail . . . ."12/

(5) Section 1204 provided for a "deposition" (undefined) to be used at a convicted defendant's sentencing hearing "when a witness is so sick or infirm as to be unable to attend . . . ."

(6) Section 702 provided for the "deposition" of the "informer and any witness he may produce" when a peace bond was requested to prevent the threatened commission of an offense.

(7) Section 811 provided for taking the "deposition" of "the informant or prosecutor" by whom an arrest warrant was sought.13/

11/ In 1911, section 686, subdivision 3 was broadened to authorize the use of a witness' testimony at a former trial under the same conditions as for the witness' preliminary hearing testimony. (Stats. 1911, ch. 187, § 1, p. 364.) In 1965, the section was totally rewritten. (Stats. 1965, ch. 299, § 139, p. 1368.) It now provides in relevant part that "[t]he deposition of a witness taken in the action may be read to the extent that it is otherwise admissible under the law of this state." (Pen. Code, § 686, subd. 3(b).)

12/ In 1905, the Legislature provided that a section 882 "deposition" "may be used upon the trial of the defendant, except in cases of homicide, under the same condition as mentioned in section [1345] . . . ." (Stats. 1905, ch. 570, § 2, p. 762.)

13/ Repealed by Statutes 1951, chapter 1674, section 26, page 3834. See new Penal Code sections 806 and 813.

(8) Sections 1390-1397 provided for taking "depositions" when a summons against a corporation was sought.14/

(9) Sections 1526 and 1527 provided for taking the "deposition" of "the complainant, and any witnesses he may produce" when a search warrant was sought.15/

It is indisputable that the word "deposition" as used in article I, section 13, was not intended to cover all types of "depositions" that were provided for by law at the time. If the meaning of the word "deposition," as used in the Constitution, were that broad, all of the statutes listed above would have been unconstitutional for failure to provide (1) an exception for use of depositions in homicide cases and/or (2) a requirement that the deposition be taken "in the presence of the party accused and his counsel." That the framers of the Constitution would have intended such a result is doubtful.

Long ago, this court conclusively settled which type of "deposition" was meant in article I, section 13. As pointed out in People v. Clark (1907) 151 Cal. 200, 205, "the constitutional provision [article I, section 13] . . . refers only to 'an ordinary extra-judicial deposition, taken, as it is called, de bene esse.' In view of the decisions upon the subject, the matter should be considered finally settled."

14/ These sections were substantially rewritten in 1971. (Stats. 1971, ch. 1591, §§ 1-6, pp. 3206-3207.) The word "deposition" no longer appears.

15/ Since the 1957 amendments to these sections, the word "deposition" no longer appears. (Stats. 1957, ch. 1882, § 1, p. 3288.)

The court in Clark was quoting from its prior decision in People v. Sierp (1897) 116 Cal. 249. In Sierp, the defendant was on trial for murder. At trial, over his objection, the prosecutor was permitted to read into evidence the preliminary examination testimony of a witness who was no longer available to testify. The defendant conceded that the admission of the evidence was authorized by statute (Pen. Code, § 686, subd. 3, ante, p.___*), but contended that its admission violated the clause in article I, section 13, which prohibited the use of depositions in "cases of homicide." This court rejected that contention. "[T]he clause was not intended to relate to, and does not embrace, testimony given at the judicial proceeding known as a preliminary examination . . . . The clause in question clearly refers to an ordinary extrajudicial deposition taken, as it is called, de bene esse -- that is, conditionally before a commissioner, or some officer authorized to administer oaths, and based upon the theory of danger of the witness dying, or for certain other reasons not being able to come to the court at the trial.[16/] . . . the language employed in the clause of the constitution in question

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16/ It would indeed be unlikely that the framers in 1879 intended to prohibit the use of depositions as discovery devices in criminal cases, since discovery by deposition was unknown in 1879. (Pitchess v. Superior Court, supra, 11 Cal.3d at p. 536; Shively v. Stewart (1966) 65 Cal.2d 475, 478.)

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* Multilith opinion at page 14.

clearly shows what was meant by the word 'deposition' as then used. . . . the real nature of testimony given at a preliminary examination is not changed in any respect because it is called by a particular name. Indeed, in most of the cases where such testimony is held admissible, it is called a 'deposition.'" (Id., at pp. 251-252, 254, emphasis added.)

The "deposition" sought by Runyan in the case now before this court is not a deposition taken for the purpose of preserving testimony for the prosecution. On the contrary, it is sought for the sole purpose of discovery by an accused. Thus, it is manifest that the trial court's order for discovery by deposition is not limited by any provision of our Constitution, as the majority suggests.

III

The majority further claims that the trial court's order for discovery by deposition violates statutory law, in addition to the Constitution. According to the majority, "the Legislature, pursuant to a constitutional grant, has expressed itself on the subject of depositions in criminal cases and has plainly declined to extend deposition procedures beyond those present confines carefully described in Penal Code section 1336." (Majority opn., ante, p.____.*)

* Multilith opinion at page 5.

In fact, however, this contention is grounded on a misconception of legislative intent similar to the misconception found in the majority's constitutional argument.

In Penal Code section 1335 et seq., the Legislature has provided for the deposition de bene esse authorized by the Constitution: a "deposition" in the form of a "conditional examination" of a material witness is permitted[17] when the witness "is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehension that he will be unable to attend the trial . . . ." The purpose of the "deposition" taken pursuant to these sections is to provide a substitute for the witness' testimony "on the trial" in the event "the witness is unavailable as a witness within the meaning of Section 240 of the Evidence Code."[18] (Pen. Code, § 1345.) These Penal Code provisions

[17] A deposition on behalf of the state is permitted only "in cases other than those for which the punishment may be death." (Pen. Code, § 1335.)

[18] Evidence Code section 240 provides:

"(a) Except as otherwise provided in subdivision (b), 'unavailable as a witness' means that the declarant is:

"(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his statement is relevant;

"(2) Disqualified from testifying to the matter;

"(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity;

"(4) Absent from the hearing and the court is unable to compel his attendance by its process; or

(Fn. 18 continued)

are silent on the use of depositions for the purpose of discovery,[19/] and, therefore, cannot be construed to be a bar to a court's inherent power to provide for discovery by deposition.

Any doubt about the court's power to provide for discovery by deposition where there is a statutory scheme providing only for depositions to preserve evidence for use at trial was settled by this court more than 10 years ago

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(Fn. 18 continued)

"(5) Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process.

"(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying."

19/ The majority erroneously asserts that the Legislature did in fact manifest an intent to bar discovery by deposition when it stated in Penal Code section 1341 that "the examination cannot take place" if the statutory preconditions of sections 1335 and 1336 have not been met. (Majority opn., ante, p. ___.*) The "examination" referred to obviously is the conditional examination provided for by those sections. Runyan does not seek a conditional examination. It is simply a nonsequitur to assert, as the majority does, that the unavailability of a conditional examination ipso facto precludes discovery by deposition. The majority confuses two distinct legal concepts which in the past this court has taken pains to keep separate: "depositions" used to preserve testimony for trial (i.e., a conditional examination) and depositions used for discovery purposes. (See, e.g., Shively v. Stewart, supra, 65 Cal.2d 475.) Nothing in the codification of the one evidences any legislative intent to preclude the other. (Id., at pp. 478-479.)

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* Multilith opinion at page 10.

in Shively v. Stewart (1966) 65 Cal.2d 475. In that case, two doctors requested a hearing officer of the California State Board of Medical Examiners to order discovery prior to a disciplinary hearing on abortion charges. The discovery sought consisted of four subpoenas requesting prehearing depositions and the production of documents. The Administrative Procedure Act (Gov. Code, § 11500 et seq.), which governed the conduct of the disciplinary hearings, contained a provision for the taking of depositions when the witness was unable to or could not be compelled to attend the hearing (Gov. Code, § 11511). However, the Administrative Procedure Act contained no express provision dealing with prehearing discovery by deposition. When the hearing officer refused to comply with the request, the doctors petitioned for a writ of mandate to compel discovery.

This court issued the writ and mandated discovery by deposition, relying on general criminal law discovery principles. "The criminal law analogy is appropriate here," the court said. "Petitioners have been charged with crimes and should have the same opportunity as in criminal prosecutions to prepare their defense." (Shively, supra, 65 Cal.2d at pp. 479, 480.)

This court began its analysis by noting that "in authorizing the taking of depositions when the witness will be unable to or cannot be compelled to attend, section 11511 [like Penal Code section 1335 et seq.] provides for depositions, not for the purpose of discovery, but to secure

evidence for use at the hearing." (Id., at pp. 478-479.) This statutory scheme, this court held, evidenced "[t]he Legislature's silence with respect to prehearing discovery . . . ." (Id., at p. 479.) This silence "does not mean, however, that it [the Legislature] has rejected such discovery. Instead, as in the case of criminal discovery [citation], it has left to the courts the question whether modern concepts of administrative adjudication call for common law rules to permit and regulate the use of the agencies' subpoena power to secure prehearing discovery." (Ibid., emphasis added.) Noting that "[s]tatutory administrative procedures have been augmented with common law rules whenever it appeared necessary to promote fair hearings and effective judicial review" (Ibid.), the court ordered the hearing officer to issue subpoenas (1) to obtain certain documents and (2) to depose two board officers "to determine whether there is 'good cause' for the production of other documents that are neither privileged nor protected as the attorney's work product." (Id., at p. 482.)

In the present case, the majority's arguments fail to overcome the logic and force of this court's opinion in Shively. If the statutory scheme providing for depositions to secure evidence at trial indicated a "legislative silence" with respect to depositions as a discovery device in Shively, then by the same token, the same conclusion must be drawn here. Since it is well settled that "[l]egislative silence

on criminal discovery . . . means that it has left to the courts the adaptation of common law concepts" in the area (Pitchess, supra, 11 Cal.3d at p. 536), it is clear there is no statutory bar to a court ordering discovery by deposition as was done in the present case.[20/]

IV

In support of its conclusion that discovery by deposition is barred in a criminal case, the majority adopts the Court of Appeal decision in Clark v. Superior Court, supra, 190 Cal.App.2d 739[21/] and relies on this court's opinions in Reynolds v. Superior Court (1974) 12 Cal.3d 834 and Bailey v.

20/ A Court of Appeal decision subsequent to Shively purported to limit the holding therein; it held that Shively authorized only a deposition with the "limited purpose" of producing "evidentiary material which the witness [deponent] has in his possession or under his control." (Everett v. Gordon (1968) 266 Cal.App.2d 667, 672, 673.)

The court in Everett recognized that the language of Shively conflicted with a pre-existing Court of Appeal decision, Clark v. Superior Court (1961) 190 Cal.App.2d 739, which had held that a court has no power to order discovery by deposition in a criminal case. The court chose to adopt the reasoning of Clark and held that Shively was limited by Clark. However, as will be seen in Part IV, post, Clark was wrongly decided. It follows that Everett was likewise wrongly decided.

21/ The majority has cited a number of cases, which follow Clark without analysis. (Majority opn., ante, p. ___.*) These cases, like Clark, should be disapproved.

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* Multilith opinion at page 8.

Superior Court (1977) 19 Cal.3d 970. However, Clark was based on faulty premises which led the Court of Appeal to an unsound result, and the doctrines set forth in Reynolds and Bailey are inapplicable to this case.

In Clark, supra, the Court of Appeal held that a court has no power to order discovery by deposition in a criminal case. This result was based on the following premises: (1) "the Legislature, over the years, has seen fit to provide for the taking of depositions of prosecution witnesses in criminal cases only in the limited situations set forth in [Penal Code sections 1335, 1336, 1349]" (Id., at p. 741); (2) "the California Constitution seems to qualify the right to depositions in criminal cases [by] article I, section 13" (Ibid.); and (3) it is "highly significant" that "in 1957 the Legislature greatly liberalized discovery and the taking of depositions in civil cases" but "made no change in the statutes concerning depositions in criminal cases." (Id., at p. 742.)

Each of these premises is unsound. First, it is incorrect that Penal Code section 1335 et seq. were the only statutory provisions for depositions in criminal cases. As indicated earlier (ante, p.____*), the Legislature has over the years provided for depositions in at least eight other Penal Code sections.

Second, as extensively discussed in Part II, ante, the Constitution was intended solely to authorize a

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* Multilith opinion at pages 13-15.

deposition de bene esse, not to limit the use of depositions in other areas. Indeed, were the Court of Appeal correct that the Constitution limits "the right to depositions in criminal cases," then, as noted, all of the other code sections enacted by the Legislature over the years providing for "depositions" would be unconstitutional for failure to provide an exception in cases of homicide and/or to provide for the presence of the party accused and his counsel.

Finally, an incorrect inference was drawn from legislative inaction on criminal discovery. As this court has repeatedly held, the correct inference to be drawn from the Legislature's silence in the criminal area is that it has left the field to the courts. (Pitchess, supra, 11 Cal.3d at p. 536; Shively, supra, 65 Cal.2d at p. 479.) Further, the fact that the Legislature enacted comprehensive legislation regarding depositions in civil cases has no bearing on criminal discovery. As this court pointed out in Pitchess, supra, 11 Cal.3d at p. 536, "civil discovery procedure has no relevance to criminal prosecutions." The reasoning in Clark is clearly wrong and should be disapproved.

The next case relied on by the majority in denying discovery by deposition is Reynolds, supra, 12 Cal.3d 834. From Reynolds, the majority culls policy considerations purportedly applicable here: the court should not exercise its inherent discovery powers when (1) "the issues involve . . . 'complex and closely balanced questions,'" (majority opn.,

ante, p.____*) and (2) the discovery procedure in question is not "necessary to protect some fundamental constitutional principle or to effectuate some specific constitutional guarantee of individual liberty [but rather merely] may seem to some socially desirable . . . ." (Ibid., emphasis omitted.) Neither of these "considerations" is in fact involved in this case.

As to the first of these considerations, the majority opinion is somewhat misleading. The full quotation from Reynolds, supra, 12 Cal.3d at p. 837, from which the majority's language comes, speaks to "complex and closely balanced questions of state and federal constitutional law . . . ." (Emphasis added.) Thus, as the court recognized in Allen v. Superior Court (1976) 18 Cal.3d 520, 524, this consideration applies only where "intricate state and federal constitutional questions [are] presented."[22/] In the present case, it is not contended that the federal Constitution bars the order for discovery by deposition made by the municipal court, and as shown above, there is no provision

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22/ In Allen, supra, a closely divided court struck down a trial judge's order that a criminal defendant reveal the names of his witnesses so that they might be read to the prospective jurors. However, the seven justices were unanimous that the court had the power to authorize such discovery and that the rationale of Reynolds did not apply to that case.

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* Multilith opinion at pages 13-14.

in the state Constitution that even touches upon depositions as a means of discovery.

As to the second consideration, the quotation from Reynolds is taken out of context. If the majority were correct that this court can promulgate discovery rules only when constitutionally "necessary," then there could be no judicially created rules of discovery in California, since -- as the majority notes elsewhere in its opinion -- our liberal discovery rules are generally not constitutionally compelled. (Majority opn., ante, p.____.*) This result would not only be absurd, but would conflict with nearly every decision on discovery by this court since Riser in 1956. Surely, the majority could not intend such a result.[23/]

23/ The issue in Reynolds was whether this court should judicially create a rule for discovery by the state of an alibi defense of an accused. The court unanimously declined to do so.

The passage from Reynolds, quoted by the majority, arose "in the [limited] context of the dichotomy between judicial rule-making inspired or required by constitutional limitations on the power of government, and judicial rule-making which would merely grant to the government rights which it might legislatively claim for itself . . . ." (Reynolds, supra, 12 Cal.3d at p. 846.)

Thus, the principle set forth in that passage applies only "when the court's common law powers are sought to be invoked not so as to effectuate the protections constitutionally guaranteed to an otherwise helpless accused, but to give the state the full benefit of the legislative

(Fn. 23 continued)

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* Multilith opinion at pages 10-11.

The final case relied on by the majority, Bailey v. Superior Court, supra, 19 Cal.3d 970, is likewise inapplicable. There the defendant in a civil action sought to record and report the proceedings at a deposition by means of videotape. After reviewing the applicable code sections, this court concluded that since the Legislature had directed that deposition testimony be stenographically recorded and transcribed in writing unless the parties agreed otherwise, the Legislature should determine whether other methods of recording and reporting depositions should now be authorized. (Id., at pp. 974, 978.)

Thus, in Bailey, this court was presented with an issue on which the Legislature had specifically spoken. However, the situation is quite different in the present case. As discussed extensively in Part III, ante, while the Legislature has addressed the issue of the use of depositions in criminal actions to preserve testimony for trial, it has not done so with regard to the use of depositions for discovery purposes. As the majority recognizes, in the criminal area, "legislative silence on the subject of discovery 'means that it has left to the courts the adaption of common law concepts.'" (Majority opn., ante, p.____*, quoting from Pitchess v. Superior Court, supra, 11 Cal.3d at p. 536.)

(Fn. 23 continued)

leeway constitutionally accorded it." (Id., at pp. 847-848.) It is clearly inapplicable when, as here, an accused seeks to protect his right to a fair trial.

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* Multilith opinion at page 4.

V

A court has not abused its discretion when it grants discovery by deposition in a case where an individual has been accused of several serious criminal offenses and he was knocked unconscious and cannot remember the events underlying those charges; the police officers are the only other persons who know what occurred; and there is a possibility that some evidence against the accused may have been fabricated.

The trial court specifically found that Runyan could not prepare an adequate defense without the ability to depose these police officers. In order to ensure a fair trial to an accused, it is clear that our courts possess broad discretion in the area of criminal discovery. A careful review of the state Constitution and statutes indicates there is no impediment to the exercise of jurisdiction in this area by a trial court. Therefore, the judgment of the lower court should be affirmed.

BIRD, C.J.

I CONCUR:

TOBRINER, J.

APPENDIX "B"

Opinion of the Court of Appeal

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
The MUNICIPAL COURT FOR the PASADENA JUDICIAL DISTRICT OF LOS ANGELES COUNTY, Defendant and Respondent;
Donald Gene RUNYAN, Real Party in Interest.

Civ. 48691.
Court of Appeal, Second District, Division 4.
Nov. 16, 1976.
Rehearing Denied Dec. 9, 1976.
Hearing Granted Jan. 13, 1977.

The Superior Court, Los Angeles County, John W. Holmes, J., denied writ of prohibition sought to prevent pretrial discovery ordered by the municipal court, and petitioner appealed. The Court of Appeal, Jefferson, J., held that allowing respondent, who was charged with commission of misdemeanors, who allegedly could not remember or was confused about events in question, and who without assistance of discovery order would not have opportunity to call and examine four police officers that participated in his arrest prior to trial, to take depositions of such police officers constituted proper exercise of judicial discretion under court's inherent power to ensure respondent a fair trial.

Affirmed.

1. Prohibition ⇐34

Denial of writ of prohibition sought to prevent pretrial discovery ordered by municipal court in misdemeanor case was appealable. West's Ann.Code Civ.Proc. § 904.1(a).

2. Criminal Law ⇐627.5(2)

In absence of comprehensive legislative treatment of criminal discovery procedure under new constitutional provision, allowing respondent, who was charged with commission of misdemeanors, who allegedly could not remember or was confused about events in question, and who without assistance of discovery order would not have opportunity to call and examine four police

officers that participated in his arrest prior to trial, to take depositions of such police officers constituted proper exercise of judicial discretion under court's inherent power to ensure respondent a fair trial. West's Ann.Const. art. 1, § 15.

Byron B. Gentry, Pasadena City Prosecutor, for petitioner and appellant.

Horn & Hoppe by Michael J. Hoppe, Jr., Pasadena, for real party in interest and respondent.

JEFFERSON, Associate Justice.

[1] Petitioner, the People, through the City Prosecutor of Pasadena, sought a writ of prohibition in the superior court in an effort to prevent pre-trial discovery ordered by the municipal court in the case at bench. The writ was denied; the denial is appealable. (See Code Civ.Proc., § 904.1, subd. (a); *Burrus v. Municipal Court* (1973) 36 Cal.App.3d 233, 235, 111 Cal.Rptr. 539.)

Since the record presented to us for review contained only a portion of the superior court record, but did not include certain pertinent material lodged therein, *i. e.*, a declaration filed in the municipal court, and the transcript of oral proceedings there, we augmented our record to include this material. (See Cal. Rules of Court, Rule 12, subd. (a).)

On March 3, 1975, the City Prosecutor filed a complaint that charged Donald Gene Runyan with the commission of three misdemeanors: a violation of Vehicle Code section 23102, subdivision (a) (drunk driving); a violation of Penal Code section 148 (obstructing a peace officer in the performance of his duty); and a violation of Penal Code section 594, subdivision (a) (vandalism). It was alleged that the offenses occurred in Pasadena on March 2, 1975.

Defense counsel moved for pre-trial discovery, asserting that defendant Runyan did not have sufficient information concerning the charges to prepare his defense. Defense counsel filed, in support of the motion, a declaration in which it was asserted that defendant had been driving his van in Pasadena on March 2, 1975, when he had an automobile accident; that as a result of the accident, he had fallen from his vehicle and had hit his head on the pavement, rendering him unconscious. He was revived at the scene by paramedics, and was attempting to start his vehicle when the Pasadena police arrived.

According to the declaration, defendant was ordered from the vehicle by the police and, when he protested, was physically removed from the vehicle by the police, at which time he again struck his head on the pavement. It is asserted that defendant was placed in handcuffs, but the police did not tell him the basis for his arrest; that defendant kicked at the police car; that one officer became extremely verbally abusive. Defendant complained that the handcuffs were too tight; according to the defendant, the complaint resulted in a police officer tightening them even further. Defendant was booked and given a breathalyzer test for intoxication, which showed .023. The declaration charged that the test had been deliberately falsified by the police after the arrest in order to justify the arrest.

Defendant sought to discover the following matters: (1) all information in the possession of the City Prosecutor relating to the charges made against him; (2) information possessed by the arresting police officers, by way of deposing those officers; (3) information under the control of the Pasadena Chief of Police, *i. e.*, copies of any and all complaints made against the arresting officers for brutality or untruthfulness, and any and all fitness reports relating to their propensities for the same character traits.

The City Prosecutor did not oppose discovery of item (1) but did oppose discovery of items (2) and (3). After a hearing, which included taking the testimony of defendant to the effect that he had sustained a head injury due to the accident, and either could not remember or was confused about subsequent events, the trial court granted defendant's motion in its entirety, but restricted the right to take depositions of police officers to the four Pasadena police officers identified as those who had taken part in defendant's arrest. The writ of

prohibition was denied by the appellate department of the superior court without written opinion.

On this appeal, the City Prosecutor, representing the People as petitioner, argues that the trial court had no discretion to grant defendant's discovery motion with respect to depositions. As no argument was made concerning the matters set forth in item (3), *supra*, we assume the appeal has been abandoned to that extent. Runyan, the real party in interest, relies upon a doctrine which has evolved by judicial decisions of the California Supreme Court—a doctrine favoring pre-trial discovery by defendants when the trial court deems such discovery appropriate—as support for the discovery order made in the instant case, which directed the taking of depositions.

Pre-trial discovery by a defendant was unknown at common law. "Originally at common law the accused in a criminal action could not compel production of documents or other evidence in the possession of the prosecution. [Citation.] Production was denied before trial on the ground that to compel the prosecution to reveal its evidence beforehand would enable the defendant to secure perjured testimony and fabricated evidence to meet the state's case. It was felt, furthermore, that to allow the defendant to compel production when the prosecution could not in its turn compel production from the defendant because of the privilege against self incrimination would unduly shift to the defendant's side a balance of advantages already heavily weighted in his favor." (*People v. Riser* (1956) 47 Cal.2d 566, 585, 305 P.2d 1, 13, overruled on other grounds by *People v. Morse* (1964) 60 Cal.2d 631, 637, 36 Cal.Rptr. 201.)

In *Riser*, however, the California Supreme Court stated that "[t]he decisions of this court have always impliedly recognized that on a proper showing a defendant in a criminal case can compel production [of evidence] when it becomes clear . . . that the prosecution has in its possession relevant and material evidence. . . . [¶] . . . [t]he state has no interest in denying the accused access to all evidence that can throw light on issues in the case, . . . the true purpose of a criminal trial [is] the ascertainment of the facts. [Citations.]" (*Riser, supra*, 47 Cal.2d 566, at pp. 585–586, 305 P.2d 1, at p. 13.)

Riser was followed by *Jones v. Superior Court* (1962) 58 Cal.2d 56, 59–60, 22 Cal.Rptr. 879, 372 P.2d 919, in which the Supreme Court observed that neither the common law nor the concept of due process mandated pre-trial discovery in favor of defendants, but that it was appropriate "for the courts to develop the rules governing discovery *in the absence of express legislation* authorizing such discovery." (*Jones, supra*, 58 Cal.2d 56, at p. 59, 22 Cal.Rptr. 879, at p. 880, 372 P.2d 919, at p. 920.) (Emphasis added.)

In *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535–536, 113 Cal.Rptr. 897, 900, 522 P.2d 305, 308, the court further elaborated on the underlying policy for discovery in criminal cases as follows: "Unlike the statutory development of civil discovery in California, the right of an accused to seek discovery in the course of preparing his defense to a criminal prosecution is a judicially created doctrine evolving in the absence of guiding legislation. [Citations.] A defendant's motion to discover is addressed solely to the sound discretion of the trial court, which has inherent power to order discovery when the interests of justice so demand. [Citations.] Allowing an accused the right to discover is based on the fundamental proposition that he is entitled to a *fair trial* and an intelligent defense in light of all relevant and reasonably accessible information. [Citations.]" (Emphasis added.)

In setting forth the requirements which a defendant must meet to obtain discovery, the *Pitchess* court said that "[t]he requisite showing may be satisfied by general allegations which establish some cause for discovery other than 'a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime.' [Citations.]" (*Pitchess*,

supra, 11 Cal.3d 531, at p. 537, 113 Cal.Rptr. 897, at p. 901, 522 P.2d 305, at p. 309.)

The *Pitchess* characterization of pre-trial discovery as a potential element of fair trial in the interests of justice, a due process concept, has been approved in *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 520, 116 Cal.Rptr. 260, 266, 526 P.2d 268, 274, wherein it was referred to as "the slightly more liberal criminal law requirement [compared to the civil practice rule] that the information sought be demonstrated necessary for a fair trial," and in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 293, 124 Cal.Rptr. 204, 208, 540 P.2d 44, 48, where it was set forth as "the established principle that in a criminal prosecution an accused is generally entitled to discover all relevant and material information in the possession of the prosecution that will assist him in the preparation and presentation of his defense."

The People's argument is that all of these expressions of principle have no application to the case at bench because they apply generally to discovery rather than specifically to depositions, and because they are only operable in the *absence* of legislative enactment. The People assert that, since the California Legislature has offered its guidance in the matter of depositions in criminal cases, the statutory law must be followed by the courts without consideration of any inherent judicial power as a protection of a criminal defendant's fair trial rights. We disagree.

In analyzing the People's position, we turn first to the California Constitution. Prior to 1974, article I, section 13, provided, in pertinent part that "[t]he Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial." The People rely upon *Clark v. Superior Court* (1961) 190 Cal.App.2d 739, 741–742, 12 Cal.Rptr. 191, which interpreted this provision as conferring a "qualified right" upon the Legislature to enact legislation dealing with the expressed area of constitutional concern—depositions of a witness unlikely to be available at trial.

However, this provision contained in article I, section 13, of the California Constitution, was interpreted somewhat differently in an early California Supreme Court case. (See *People v. Hurtado* (1883) 63 Cal. 288; affirmed on other grounds, *Hurtado v. California* (1884) 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232. *Hurtado*, noting that this provision was included with other fundamental protections such as the right not to incriminate oneself, the right not to be placed in jeopardy twice, and the right to confront witnesses, viewed the deposition clause as additional protection to criminal defendants. *Hurtado* was a prosecution for murder and, in discussing the application of the clause in that case, the court said: "It may be that by reason of the exception depositions cannot now be used *against* the defendant in cases of homicide, even although they are taken in the presence of the party charged with that crime, and with full opportunity for cross-examination. But in other cases the legislature may authorize depositions to be taken on the part of the prosecution. Inasmuch, however, as the tenor of the provision of the Constitution clearly shows, with the exception noted, that it was intended for the protection of defendants, there is no prohibition upon the power of the legislature to authorize the taking of depositions by the *defendant* in every class of criminal cases." (*Hurtado, supra*, 63 Cal. 288, at p. 294.) (Emphasis in original.)

In 1872, the Legislature had enacted Penal Code sections 1335–1345, dealing with the "examination of witnesses conditionally." Section 1335 now provides: "When a defendant has been charged with a public offense triable in any court, he in all cases, and the people in cases other than those for which the punishment may be death, may, if the defendant has been fully informed of his right to counsel as provided by law, have witnesses examined conditionally in

his or their behalf, as prescribed in this chapter."

Penal Code section 1335 was last amended in 1967, when conditional examinations were authorized in connection with offenses "triable in any court" instead of in "the superior court."

Penal Code section 1336 provides that application, upon affidavit, may be made by the defendant or the People for an order of examination "[w]hen a material witness for the defendant, or for the people, is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehension that he will be unable to attend the trial . . ." Under Penal Code section 1339, the court to whom the examination motion is addressed must specify the time and place of such examination and before a designated magistrate. Section 1341 gives the magistrate the power to preclude the examination if he finds that "the witness is not about to leave the state, or is not sick or infirm, or that the application was made to avoid the examination of the witness on the trial . . . ."

In *Clark*, these sections of the Penal Code were interpreted as a *legislative limitation* on the right of defendants to take depositions in criminal cases. "While the Legislature in 1957 liberalized discovery and the taking of depositions in civil cases, it made no change in the statutes concerning depositions in criminal cases. This fact is highly significant." (*Clark, supra*, 190 Cal.App.2d 739, at p. 742, 12 Cal.Rptr. 191, at p. 193; see also *Everett v. Gordon* (1968) 266 Cal.App.2d 667, 72 Cal.Rptr. 379, applying the *Clark* holding to administrative hearings.)

In *People v. Bowen* (1971) 22 Cal.App.3d 267, 99 Cal.Rptr. 498, a murder prosecution, defendant had moved to depose the murder victim's four-year-old son prior to trial; the trial court denied the motion, and the denial was upheld on appeal. The appellate court squarely rejected defendant's contention that he had an *unqualified* right to discovery, including the taking of depositions, as one aspect of his constitutional right to confront witnesses. *Bowen* also pointed out that the defendant therein had not complied with the statutes conceived as the implementing legislation for the rights set forth in Penal Code sections 1335 et seq., i. e., had not made a sufficient showing in terms of the expected unavailability of the witness to invoke the specified conditional examination procedure.

The result in Bowen might well have been reached by an exercise of judicial discretion, considering the age of the witness involved. It is significant that both *Clark* and *Bowen* pre-date the Supreme Court cases which have regarded discovery in terms of fair trial.

It seems abundantly clear that Penal Code sections 1335–1341 were in direct response to the constitutional authorization for deposition legislation found in article I, section 13 of the California Constitution which authorized such legislation solely in the case of a witness likely to be unavailable to testify at the trial for any cause. As long as the constitutional authorization remained unchanged, there was no cause for the Legislature to change the legislation.

[2] The situation is now different, however. In 1974, section 13 of article I of the California Constitution was repealed and the substance of its provisions placed in a new section—section 15 of article I. In section 15, a radical change was made in the constitutional authorization of legislation to govern the taking of depositions in criminal cases. The pertinent language in section 15 of article I reads as follows: "The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel." Under section 15 of article I, the Legislature is not limited to providing for depositions, in criminal cases, of witnesses who are likely to be unavailable to attend and testify at the trial.

The Legislature has not seen fit to respond to the new constitutional authorization for legislation set forth in article I, section 15 of the California Constitution. It is not reasonable to conclude that legislative failure to amend Penal Code sections 1335–1342 after the repeal of section 13 of

article I of the California Constitution and enactment of section 15 of article I removing the limiting provisions of former section 13, constitutes any showing of legislative intent to limit depositions of witnesses in criminal cases. On the contrary, we interpret the failure of legislative action as leaving the development of general discovery guidelines, including depositions, to the judiciary. Runyan, the real party in interest, relies upon the inherent judicial power to ensure to a defendant a fair trial, as support for the discovery order made in the instant case. This reliance is appropriate in light of the decisional law development in the field and the change in the California Constitution provisions relating to depositions.

Runyan, the real party in interest before us, and the defendant below, is charged with the commission of misdemeanors. There will be no preliminary examination to operate as a "screening process" in this matter. Without the assistance of the order made, defendant will not have the opportunity to call and examine the four police officers who participated in his arrest prior to trial. Two of the three charges against defendant arose from events which occurred after the police arrived at the scene. It is reasonable to assume that no voluntary assistance by the police officers to this defendant will be forthcoming to enable him to prepare an "intelligent defense."

The trial judge was of the opinion that deposing the officers was necessary to ensure a fair trial of the charges, and the transcript of proceedings makes it clear that he was not relying on the likely unavailability of these police officers at trial, as the procedure outlined in Penal Code sections 1335 1345 was not employed by him. Such procedure had no application or relevance to the facts of the matter before the trial judge. He was relying on the general standard concerning discovery in criminal cases expressed by our Supreme Court. We have concluded that this standard controls, especially in the absence of comprehensive legislative treatment of criminal discovery procedure.

We hold that judicial discretion was properly exercised in the case at bench. Hence, the People's petition for writ of prohibition was properly denied.

The judgment appealed from is affirmed.

KINGSLEY, Acting P. J., and DUNN, J., concur.

APPENDIX "C"

Order Denying Rehearing

SUPREME COURT
FILED

L. A. No. 30722

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, Plaintiff and Appellant
v.

THE MUNICIPAL COURT FOR THE PASADENA JUDICIAL DISTRICT OF LOS ANGELES COUNTY, Defendant and Respondent

RUNYAN, Real Party in Interest and Respondent

Petition of Real Party in Interest and Respondent for rehearing DENIED.

Bird, C.J., and Tobriner, J., are of the opinion that the petition should be granted.

I, C. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 26th day of June A.D. 1978

Clerk

By R. Johnson
Deputy Clerk

Bird
Chief Justice

APPENDIX "D"

Copy of Notice of Appeal

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, vs. THE MUNICIPAL COURT FOR THE PASADENA JUDICIAL DISTRICT OF LOS ANGELES COUNTY, Defendant and Respondent; DONALD GENE RUNYAN, Real Party in Interest and Respondent.	)	NO. LA 30722

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that DONALD GENE RUNYAN, the Real Party in Interest and Respondent in the above captioned action, hereby appeals to the Supreme Court of the United States from the Final Order of the Opinion of the Supreme Court of the State of California, filed January 20, 1978, L.A. No. 30722, entered herein on March 9, 1978, upon denial of Petition for Rehearing.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

SOUTHWESTERN CLINICAL LAW CENTER

By _____
R. J. WILLIAMSON
Attorneys for Donald Gene Runyan, Respondent

3045 West Seventh Street
Los Angeles, California 90005

PROOF OF SERVICE

I, ROBLIN J. WILLIAMSON, attorney in the office of Southwestern Clinical Law Center, attorneys of record for DONALD GENE RUNYAN, appellant herein, depose and say that on the sixth day of June, 1978, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on all parties to the proceeding in the court where the judgment appealed from was issued by depositing the same in a United States mailbox with first class postage prepaid, addressed as follows:

to BYRON B. GENTRY
Pasadena City Prosecutor
142 North Arroyo Parkway
Suite 303
Pasadena, Calif. 91103

to PASADENA MUNICIPAL COURT
200 North Garfield Avenue
Pasadena, Calif. 91101

_____
ROBLIN J. WILLIAMSON

Subscribed and sworn to before me, at 3045 West Seventh Street, Los Angeles, California 90005, this sixth day of June, 1978.

OFFICIAL SEAL
ANITA ROSENFIELD
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Commission Expires July 27, 1978

_____
ANITA ROSENFIELD

ME

Supreme Court, U. S.
FILED
SEP 15 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-6868

77-6868

DONALD GENE RUNYAN,

Appellant.

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-6868

DONALD GENE RUNYAN,

Appellant,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of California on the grounds that it is manifest that the judgment is not final, no state statute was upheld against a claim that it was repugnant to the federal Constitution, and the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

I.

THE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. Statutes

This appeal raises the question of whether the right to a fair trial, due process or effective assistance of counsel requires that a pretrial deposition of a material witness for purposes of discovery be ordered upon defendant's request where defendant alleges unconsciousness at the time of the crime.

In the court below, appellant urged that the

court order the deposition pursuant to its inherent power of rule-making to ensure a fair trial and procedural due process. The court acknowledged that it would exercise such power where necessary to preserve constitutional rights but where no such right was involved, as here, it would not engage in rule-making where the Legislature had already established the applicable procedural rules. The statutes involved were California Penal Code sections 1335-1341.

Penal Code sections 1335-1341 provide that where the trial court finds that a material witness for the defendant or People is about to leave the state or is so sick or infirm as to afford reasonable grounds for apprehension that he will be unable to attend trial, the deposition must take place. However, if the trial court does not find such ground to exist, the deposition cannot take place.

B. The Nature of the Case

On March 3, 1975, the Pasadena City Prosecutor filed a complaint charging appellant with three misdemeanor violations alleged to have occurred on or about March 2, 1975: Driving under the influence of alcohol, a violation of Vehicle Code section 23102(a); obstructing a peace officer in the performance of his duty, a violation of Penal Code section 148; and vandalism, a violation of Penal Code section 594(a).

A pretrial motion for discovery was made on April 1, 1975, in Pasadena Municipal Court, which motion sought: (1) All information in the possession of the Pasadena City Prosecutor relating to the charges against defendant; (2) the depositions of all officers involved in the charges; and (3) a subpoena duces tecum served on the Pasadena Chief of Police requiring him to produce copies of any and all complaints made against the officers involved in this case for brutality

or untruthfulness and any and all fitness reports relating to their propensities for brutality and truthfulness.

The Pasadena City Prosecutor did not oppose discovery of Item No. 1 but did oppose discovery of Nos. 2 and 3. The appeal involving No. 3 has been abandoned. The entire motion was granted by the Pasadena Municipal Court.

The Pasadena City Prosecutor filed a motion to vacate the order granting discovery and to limit the discovery to No. 1.

Item No. 1, the entire file of the Pasadena City Prosecutor, together with the police report and the "rap sheet" of appellant, had already been supplied to the latter's attorney. The Pasadena City Prosecutor objected to the previous order granting discovery on the grounds that there had been no compliance with California Penal Code sections 1335 et seq., that the information sought was not relevant or material to the case and furthermore was inadmissible, and that there was no affidavit or declaration by appellant showing sufficient cause to allow such discovery. The motion was denied despite the fact that there was no showing that any of the officers were about to leave the state or were sick or otherwise unable to attend trial.

The Pasadena City Prosecutor then filed a Petition for Writ of Prohibition in Department 70 of the Superior Court for the County of Los Angeles. The petition asserted depositions may be taken conditionally only under the express provisions of California Penal Code sections 1335 et seq., and that appellant's order was improper as not coming within those provisions.

On June 10, 1975, the Honorable John W. Holmes, Judge of the Superior Court, denied the Pasadena City

Prosecutor's Petition for Writ of Prohibition and discharged the alternative writ.

On November 16, 1976, the Court of Appeal of the State of California, Second Appellate District, Division Four, affirmed the Superior Court's decision and denied a Petition for Rehearing on December 9, 1976.

Upon petition for hearing to the Supreme Court of California, the decision of the Court of Appeal of California was reversed over appellant's contention that the court order such deposition pursuant to its inherent rule-making power to ensure a fair trial and procedural due process.

II.

ARGUMENT

A. The Appeal Should be Dismissed Because the Judgment is Not Final

The instant case remains to date at the pretrial stage, the California Supreme Court having ruled the trial court's grant of the request for pretrial deposition improper. An appeal will not lie nor a petition for writ of certiorari be granted where judgment is not final. (28 U.S.C. § 1257.)

The denial of intermediate relief in a state criminal case is not a final judgment and, thus, in such instance the court will dismiss for lack of jurisdiction under 28 U.S.C. § 1257. In Wilson v. Schnettler (1961) 365 U.S. 381, 385, this Honorable Court noted that in a state criminal case, an adverse interlocutory order denying a motion to suppress evidence should not be reviewed until the state court has fully performed its duty. This is so because if there is adherence to such order resulting in prejudice, an appeal to the state court and petition for writ of certiorari would lie. (Id., at 385. In Arceneaux v. Louisiana (1964) 376 U.S. 336,

338, petitioner's request for a preliminary examination prior to a trial for vagrancy had been denied in the state courts. This Court found that denial of intermediate relief was not a final judgment within the meaning of 28 U.S.C. § 1257. (See also N.A.A.C.P. v. Williams (1958) 359 U.S. 550.) In the instant case, no appeal lies as a matter of right because this matter has not gone to trial. Dismissal, acquittal, and voluntary compliance with the discovery request are among the possibilities which would moot the issue. Therefore, the policy of requiring final judgment is applicable here, and this appeal should be dismissed.

B. The State Statutes Were Not Upheld Against a Claim of Repugnancy to the Federal Constitution

Appellant contended in the California Supreme Court that the right to a fair trial and to procedural due process required the court to exercise its inherent rule-making power to order depositions for discovery purposes in criminal prosecutions. Appellant states (Juris. Statement p. 7) that the California Supreme Court's opinion

> ". . . denying appellant's discovery motion was rendered notwithstanding appellant's contentions that such discovery was essential to ensuring effective counsel and was granted pursuant to a valid exercise of the trial court's inherent power to conduct a fair trial and ensure due process of law. . . ."

The court declined to exercise such power. The California Supreme Court acknowledged in its opinion that it would exercise such power where a constitutional right were at issue:

> ". . . As we explained in Reynolds, 'It is one thing for a court to prescribe judicial procedure necessary to protect some fundamental constitutional principle or to effectuate some specific constitutional guarantee of individual liberty. [Citations.] It is quite another thing for a court to design judicial procedures which are in no way required by higher law but which may seem to some socially desirable and perhaps may be permitted--at least to some extent--by our state and federal Constitutions.'. . ." (Original italics.) (People v. Municipal Court (Runyan) (1978) 20 Cal.3d 523, 532; see Appellant's App. A.)

The court observed that there was no constitutional foundation to the contention that the right to a fair trial mandated depositions for discovery purposes. (Ibid., at 530.)

The court very clearly distinguished its response to a request to exercise its inherent power where a constitutional right was involved from its exercise of such power in the absence of such a right. In this case, in the absence of a constitutional issue, it construed California Penal Code sections 1335-1341 as legislative action controlling the circumstances in which depositions could be obtained in criminal cases. The court held that it would not create rules where the Legislature had spoken.

It is clear then that the court did not uphold the validity of a state statute against a claim it was repugnant to the federal Constitution. Instead, the court was urged to exercise its inherent rule-making power to preserve an asserted

constitutional right. It acknowledged it would do so where a constitutional right was at stake. The court declined to impose a rule in this case because no constitutional right was in issue. It concluded that it would not otherwise employ such power where the Legislature had spoken, in this case by California Penal Code sections 1335-1341. Thus, because a state statute was not upheld against a claim of repugnancy to the federal Constitution, an appeal will not lie. (28 U.S.C. § 1257(2).)

It is essential to this Honorable Court's jurisdiction on appeal that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws. (Charleston Assn. v. Alderson (1944) 324 U.S. 182, 185.) The record must show that such contention was made below. (Live Oak Assn. v. R.R. Comm. (1925) 269 U.S. 354, 358-359.) In this case, both appellant in his jurisdictional statement and the California Supreme Court in its opinion define the issue to be whether the court should order depositions pursuant to its inherent power, not whether California Penal Code sections 1335-1341 were constitutional. This appeal should be dismissed because a state statute was not upheld against a claim of repugnancy to the Constitution.

C. No Substantial Federal Question is Involved in the Instant Appeal

It is clear that the denial of appellant's request for a pretrial deposition of the arresting officer for discovery purposes on grounds of appellant's unconsciousness at the time of arrest is not an infringement of a constitutional right to effective counsel, fair trial, or due process. Suppression of material evidence favorable to an accused is

a denial of due process justifying a new trial "irrespective of the good faith or bad faith of the prosecution." (Brady v. Maryland (1963) 373 U.S. 83, 87.) In the Brady case, the codefendant's extrajudicial statement in which the declarant admitted the actual homicide was not disclosed. This Court found this to be a denial of due process and violative of the Fourteenth Amendment. (Ibid., at 91.) It is equally well settled that the People must voluntarily provide material evidence which is exculpatory in nature. (United States v. Agurs (1975) 427 U.S. 97, 109-110.) This line of cases, of course, deals with disclosure of information by the People.

However, it is well settled that the government has no responsibility to call all witnesses who are competent to testify. (Washington v. United States (5th Cir. 1960) 275 F.2d 687, 690; see also Masciale v. United States (1958) 356 U.S. 386, 388.) A defendant is responsible to call witnesses, the testimony of whom he desires. (United States v. Grooms (7th Cir. 1972) 454 F.2d 1308, 1311, cert. den. (1972) 409 U.S. 858.)

A criminal defendant is entitled to access to any prospective witness although such a right of access may not lead to an actual interview. (United States v. Scott (6th Cir. 1975) 518 F.2d 261, 268.) There is a limitation in that a witness may refuse to be interviewed or may dictate circumstances under which he will submit to an interview. (United States v. Brown (5th Cir. 1977) 555 F.2d 407, 425, cert. den.(1978) ___ U.S. ___; Byrnes v. United States (9th Cir. 1964) 327 F.2d 825, 832, cert. den. (1964) 377 U.S. 970.) Such is not a denial of the right to a fair trial. (United States v. Brown supra, at 425.) Thus, no federal question of substance is raised by the instant case.

Where appellants have failed to raise any substantial federal question, an appeal will be dismissed. (Palmer Oil Corp. v. Amerac. Corp. (1952) 343 U.S. 390, 391.) Where a judgment rests on adequate state grounds, there is no substantial federal question. (Black v. Cutter Laboratories (1955) 351 U.S. 292, 298.) In the instant case, the California Supreme Court found no federal constitutional right to a deposition as a pretrial discovery device. This is consistent with the previously cited federal cases which have found a right under the Due Process Clause to material evidence but not a right to compel pretrial examination of witnesses.

Thus, no substantial federal question is involved where the California Supreme Court declined to exercise its inherent rule-making power on the grounds that no federal right to such deposition mandated exercise of the power and, further, that such power would not otherwise be exercised in an area where the Legislature had spoken. This appeal should be dismissed because no substantial federal question is presented.

* * * * * *

III.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment is clearly not final, it is clear that no statute was found valid against a claim it was repugnant to the Constitution, and the questions upon which this cause depends are so insubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of California.

Respectfully submitted,

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IN THE SUPREME COURT

OF

THE UNITED STATES OF AMERICA

October Term 1977

No. 77-6868

DONALD GENE RUNYAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Appeal from the Supreme Court of California

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-6868

DONALD GENE RUNYAN,

Appellant,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

I.

FINAL STATE PROHIBITION ORDERS DISPOSING OF COLLATERAL CLAIMS ARE FINAL JUDGMENTS WITHIN 28 U.S.C.§1257 AND ARE REVIEWABLE BY THIS COURT ON DIRECT APPEAL

Supreme Court review of state court decisions on appeal or certiorari is limited to "(f)inal judgments or decisions rendered by the highest court of a State in which a decision could be had..." according to 28 U.S.C.§1257.

That this Honorable Court can exercise jurisdiction pursuant to 28 U.S.C.§1257 in cases limited to review of final state prohibition orders disposing of collateral claims has long been settled and consistently upheld beginning with the case of Weston v. Charleston, 2 Pet.449 (1829) decided by the Chief Justice Marshall. This rule has been reaffirmed consistently. Detroit & M. Ry. v. Michigan R.R. Comm'n, 240 U.S.564 (1916);Missouri ex rel. St. Louis, B. & M. Ry. v. Taylor,266 U.S.200 (1924); Bandini Petroleum Co. v. Superior Court, 284 U.S.8 (1931); Pacific Coast Dairy,Inc. v. Department of Agriculture,

318 U.S.285 (1943); Rescue Army v. Municipal Court,331 U.S. 649 (1947); Madruga v. Superior Court, 346 U.S.556 (1954); City of Seattle v. Beezer, 376 U.S.224 (1964)(per curiam); Costarelli v. Massachusetts, 421 U.S.193 (1975)(per curiam); Fisher v. District Court of the Sixteenth Jud. Dist.,424 U.S. 382 (1976).

Specifically the rule was noted in Fisher v. District Court of the Sixteenth Jud. Dist., supra,

> "A judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final even if further proceedings are to be had in the lower court."424 U.S. at 385.

People v. Municipal Court(Runyan), 20 Cal.3d 523, constitutes a judgment that terminated an original proceeding in a state appellate court. The California Supreme Court's judgment has the effect of terminating the original proceeding that was initiated by the People, hereinafter Appellee, in the Superior Court Appellate Department. That original proceeding brought by the Appellee was an application for a writ of prohibition, seeking exercise of the original jurisdiction of the Appellate Depatment.[1] As stated in Bandini Petroleum Co. v. Superior Court, supra, 284 U.S. at 14, the proceeding for a writ of prohibition is a distinct

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1. Cal. Const., Art. VI,§11 states that "Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties." The Legislature through Cal.Pen. Code §1469 provided that municipal court appeals go to the Appellate Department of the Superior Court.

suit, and the judgment finally disposing of it is likewise a final judgment. This Court further noted that in California, in accordance with the general conception of the province of the writ, prohibition was for the purpose of arresting the proceedings of any tribunal exercising judicial functions without or in excess of its jurisdiction. Further, in People v. Municipal Court(Runyan), supra, the only issue decided was the jurisdiction of the lower state appellate court, in that the Appellee sought a writ of prohibition in an original proceeding, alleging that the trial court had acted without or in excess of its jurisdiction.

The prohibition order appealed in the instant case is a final state prohibition order. Since the California Supreme Court is the highest state court that can rule on such an extraordinary writ there can be no further collateral proceedings in the state court system.

The prohibition order appealed by the Appellee disposed of collateral or independent claims relating only to the jurisdiction of the trial court. The main underlying proceeding herein involved drunk driving, Cal.Veh.Code §23102(a), obstructing a police officer, Cal.Pen.Code §148, and vandalism, Cal.Pen.Code §594(a). Thus, the order appealed does not involve an ingredient of the Appellee's prosecution in this case. Instead, this case involves the narrowly defined issue of the trial court's jurisdiction. It is Appellant's position that to provide fundamental fairness, due process and the right to effective counsel, a deposition of certain police officers was needed. The trial court found that such need was demonstrated. The California Supreme Court held that the trial court's jurisdiction to order the depositions

was limited by Cal.Pen.Code §1335 et seq.

The case of Arceneaux v. Louisiana, 376 U.S.336 (1964)(per curiam) relied on by the Appellee in its motion to dismiss or affirm is clearly distinguishable. In Arceneaux, supra, this Court noted that "when petitioner sought review of the denial of a preliminary hearing, he tried to raise the constitutionality of the vagrancy statute[underlying the main proceeding]." 376 U.S. at 338. Thus, the petitioner in Arceneaux, supra, attempted to secure appellate review on precisely the same issues to be litigated at the impending trial. Such a proceeding is manifestly not collateral to the underlying main proceeding at all and the denial of review by this Court is quite consistent with its prior holdings.

Further, it is essential to note that no hearing was granted in Arceneaux, supra, by any state appellate court, as the attempted appeal was directly contrary to state law.

In Bryant v. Zimmerman, 278 U.S.63 (1928), at 70-71, this Court held that it was essential in order for it to review an appeal that the proceeding was not brought contrary to the established practice in the state, but was in keeping with the practice confirmed by local statutes. As noted by this Court in Arceneaux, supra, at 338, however:

> "In Louisiana it seems that, with exceptions not relevant here, only orders which finally dispose of criminal cases can be appealed. See La.Rev.Stat.§15:540."

In the instant case, the contrary exists. The original proceeding in the Appellate Department and the subsequent appeals were proper and authorized by State law.

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II.

ALL FACTORS FAVOR THE EXERCISE OF JURISDICTION

As noted, People v. Municipal Court(Runyan), supra, constitutes a "final judgment", notwithstanding the current pretrial status of the state trial court proceedings. Appellate review is not only proper but appropriate, as shown by consideration of the federal cases wherein immediate appellate review of discovery orders regarding depositions was allowed prior to trial. In Madison-Lewis, Inc. v. MacMahon, 299 F.2d 256(2nd Cir.1962), defendant obtained mandamus when the trial court attached a condition not authorized by the rules to the order for taking the depositions, and in In re United States, 348 F.2d624 (1st Cir.1965) it was held mandamus was available to the government when the district court's order permitting the taking of depositions was the result of a misconstruction of the rule.

Immediate review would further serve federal policy. As was held in Cox Broadcasting Corp. v. Cohn, 420 U.S.469 (1974),

> "...if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of state litigation." 420 U.S. at 483

Two basic federal policies will be preserved through immediate review of this case. First, Appellant can conceive of no greater federal policy considerations that may suffer erosion in this case than those arising under the Constitution, specifically those providing for fundamental fairness, due process and effective counsel.

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It is Appellant's position that his rights in this case are presently violated and he will suffer irreparable injury irrespective of the outcome of the main proceeding.

The effectiveness of counsel in this case is directly proportional to the duration and extent of discovery allowed in this case. Such denial of effective counsel is analogous to disqualification of counsel cases where immediate review is allowed because of the unreasonable and irreversible impact on the course of subsequent proceedings. See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (1974).

Considering that Appellant must engage in discovery before trial in order to give the right of effective counsel substance, postponement of the issue until the termination of the underlying main proceeding will nullify Appellant's right to effective assistance of counsel, causing potential irreversible harm. It has long been held by this Court that if postponement of review will cause irreparable harm, review should be granted. Forgay v. Conrad, 47 U.S.(6 How.) 200 (1848); Dickinson v. Petroleum Conversion Corp., 338 U.S.507, 511 (1950).

In additon, Appellant has the due process right to have the trial court exercise its jurisdictional power to provide for fundamental fairness. Postponement of this question until later review not only causes irreparable harm to Appellant by proceeding through an unfair trial but also propounds confusion generally in state criminal proceedings.

Finally, postponement of review until after Appellant's potential conviction places him in the most

unfortunate position of having to demonstrate that denial of the court's protection to provide fundamental fairness and effective assistance of counsel is prejudicial error based upon abuse of discretion. As noted in federal cases, such a remedy would be sadly wanting. See Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 554 (2nd Cir. 1967).

A second federal policy that is served through immediate review concerns judicial economy both in terms of unnecessary delay and deliniation of issues. Immediate review will save the time and expense of an unnecessary and unfair trial. There is no reason to delay review of properly framed issues until after the subsequent trial of the main proceeding. It has been recognized that judicial clarity of particular crucial issues is enhanced when immediate review is granted. As argued, "...appellate resolution of legal issues is improved when the issues are abstracted from the complicated network of legal and factual challenge that is often presented when a fully adjudicated case is submitted to the appellate court." Note, The Finality Rule for Supreme Court Review of State Court Orders, 91 Harv.L.Rev. 1004, 1007 (1978). Also by analogy to habeas corpus proceedings, isolation of the federal rights from other elements in the criminal prosecution promotes their vindication. Note, Federal Habeas Corpus for State Prisoners: The Isolation Principle, 39 N.Y.U.L.Rev. 79 (1964).

III.

SUBSTANTIAL QUESTIONS ARE PRESENTED

The fundamental and unanswered questions presented involve whether a state criminal statute may be applied

to deprive a defendant of a discovery device found by the trier of fact to be necessary to assure a fair trial, due process and effective counsel. The Appellee chose to state the issue as:

> "...whether the right to a fair trial, due process or effective assistance of counsel requires that a pretrial deposition of a material witness for purposes of discovery be ordered upon defendant's request where defendant alleges unconsciousness at the time of the crime." (Appellee's Motion to Dismiss or Affirm, p.1)

The Appellee fails to state, however, that findings of fact were made both by the Trial Court and the Appellate Department of the Superior Court that said depositions were necessary for a fair trial and to "...properly prepare an intelligent defense to the charges."(Juris. Statement, p.6).

Said findings, as noted in the dissenting opinion in Runyan have never been disputed by Appellee, so that the true issues are clearly the limits placed by Cal.Pen.Code §1335 et seq. on the courts power to provide for a fair trial and assure federal constitutional guarantees of effective counsel. These questions have not been answered by this court, and require plenary consideration.

WHEREFORE, for the reasons contained herein, Appellant respectfully moves this Court to deny Appellee's Motion to Dismiss or Affirm.

DATED: October 4, 1978.

Respectfully submitted,
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